v. *Wolters* [31] is one of great importance. A decision by the United States Supreme Court upon the problem would do much to clear up a doubtful situation.

DAMAGES FOR LOSS OF PROSPECTIVE CROPS. — "Although by performance the benefits of the contract would accrue at a future time, yet upon a breach by which such future advantages will be prevented, the injured party may immediately thereafter recover damages equivalent to the loss." [1] To deny that there is any case, where such an equivalent can be determined, would be, in the words of Sir George Jessel, M. R., "to limit the power of ascertaining damages in a way which would rather astonish gentlemen who practice on what is known as the other side of Westminster Hall." [2] Yet in the recent case of *Turpin* v. *Jones* [3] the court denied recovery of damages because they involved the calculation of the probable value of crops to be raised in the future. In that case the contract was for the cultivation of land upon shares. The owner of the land refused to allow the plaintiff to enter; suit was brought immediately, and before any of the season's crop had been raised, or even planted, in the neighborhood. A demurrer to the petition was sustained on the ground that damages were too conjectural.

The purpose of the law in awarding damages for breach of contract is "to put the plaintiff in as good a position as he would have been in had the defendant kept his contract." [4] The basic principle is thus compensation.[5] To determine the proper amount of compensation, the courts have adopted various tests, or measures of damage, based upon the value of various factors involved in the performance contracted for. In these crop cases the most usual test is the value of the plaintiff's share of the crop, less what he might reasonably have earned in other employments during the period of the contract.[6] Some courts take the measure of damage to be the value of the plaintiff's share, less the value of the labor he was required to perform; [7] others take the value of the lease or contract, *i. e.*, the profits to be derived therefrom.[8] The usual evidence upon which the value of the crop is computed is that of the average yield of adjoining lands, and the market price, in the same year.[9] But this is only one of the several kinds of evidence upon which the probable value

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[31] See note 1, *supra*.

[1] SUTHERLAND, DAMAGES, 4 ed., § 107.

[2] Fothergill *v.* Rowland, 17 Eq. 132 (1873).

[3] 225 S. W. 465 (1920). See RECENT CASES, p. 675, *infra*.

[4] WILLISTON, CONTRACTS, § 1338.

[5] See SEDGWICK, DAMAGES, 9 ed., §§ 29, 30; SUTHERLAND, DAMAGES, 4 ed., § 12.

[6] Somers *v.* Musolf, 86 Ark. 97, 109 S. W. 1173 (1908); Crews *v.* Cortez, 102 Tex. 111, 113 S. W. 523 (1908).

[7] Lindley *v.* Dempsey, 45 Ind. 246 (1873); Harrell *v.* Johnson, 93 Kan. 119, 143 Pac. 411 (1914).

[8] Cull *v.* San Francisco & F. Land Co., 124 Cal. 591, 57 Pac. 456 (1898); Taylor *v.* Bradley, 39 N. Y. 129 (1868); Cornelius *v.* Little, 52 Pa. Super. Ct. 394 (1913). See SEDGWICK, DAMAGES, 9 ed., § 624.

[9] U. S. Smelting Co. *v.* Sisam, 191 Fed. 293 (1911); International Agr. Corp. *v.* Abercrombie, 184 Ala. 244, 63 So. 549 (1913); Teller *v.* Bay, etc. Dredging Co., 151 Cal. 209, 90 Pac. 942 (1907).

of this factor may be calculated.[10] Its unavailability should not be sufficient ground for refusing recovery; there is usually ample other competent evidence, including the judgment of properly informed experts.[11] However, because this one sort of evidence was unavailable, the court in *Turpin* v. *Jones* denied recovery. The absurdity of considering this as the sole source of evidence is manifest in cases where such evidence will never be available, as where the crop is unique,[12] or will be available only after an extended period of time, as where the crop lease has several years to run.[13] In such cases the courts allow the jury to form a reasonable estimate of the value of the crop on the basis of all the available evidence.[14] To require evidence of the size and value of surrounding crops in the same year would be, in the former case, to deny recovery altogether, and in the latter to postpone materially the recovery of damages to which the plaintiff has an immediate right.[15]

There is undoubtedly, in our law, the principle that damages, to be recoverable, must be reasonably certain. But the certainty required is certainty as to the *fact* of damage, and not as to the *amount*.[16] Here there is reasonable certainty as to the fact of damage; it is at least reasonably certain that one who takes land on such terms will be able to raise a crop and obtain a share of it. "Where it is clear that substantial damage has been suffered, the impossibility of proving its precise limits is no reason for denying substantial damages altogether." [17] Any reasonable test for ascertaining the amount of such damage is justified; and there is no objection to the adoption by the court of the most certain test available.[18] But where one form of evidence is unobtainable,

[10] See note 9, *supra*. The same cases also admit evidence of the kind of land, the kind of crops to be raised, the average yield in previous years, and the opinion of experts as to the probable yield.

[11] "Farmers acquainted with the land in question can tell how much it would produce with proper cultivation, and there is no greater danger of mistake here than in any other case where an exercise of judgment is necessary in the estimation of damages." Zachary *v.* Swanger, 1 Ore. 92, 93 (1854).

[12] Sandusky Cement Co. *v.* Dixon Ice Co., 251 Fed. 506 (1918); People's Ice Co. *v.* The Excelsior, 44 Mich. 229, 6 N. W. 636 (1880). These were actions for the negligent destruction of ice fields; there were no similar fields in the vicinity. The measure of damage was taken to be the probable value of the crop, less the cost of harvesting it.

[13] Shoemaker *v.* Acker, 116 Cal. 239, 48 Pac. 62 (1897); Taylor *v.* Bradley, 39 N. Y. 129 (1868).

[14] In Sandusky Cement Co. *v.* Dixon Ice Co., *supra*, the amount was computed upon the basis of the average daily capacity of the plaintiff's ice plant, the average length of the harvesting season for the past five years, and the average market price for the same period.

[15] This is not a case of anticipatory breach or prospective damages. The performance to which the contract entitled the plaintiff was to be allowed to enter and hold the land; it is the value of that performance which is the extent of his damage. See SUTHERLAND, DAMAGES, 4 ed., § 107; WILLISTON, CONTRACTS, § 1339.

[16] It has been suggested that certainty as to the fact of damage and certainty as to the amount are but two aspects of the same thing, and shade into each other. See WILLISTON, CONTRACTS, § 1346. However this may be, there is undoubtedly a marked distinction between the two ends of the scale; and it is definitely possible to point to many cases where the fact of damage is reasonably certain, while the amount of such damage is incapable of exact measurement.

[17] WILLISTON, CONTRACTS, § 1345. See Shoemaker *v.* Acker, 116 Cal. 239, 242, 48 Pac. 62, 64 (1898).

[18] In Smith *v.* Phillips, 16 Ky. L. 615, 29 S. W. 358 (1895), upon which the court in Turpin *v.* Jones, *supra*, relied, the contract was for the lease of a farm at a fixed price.

the defendant, who has by his wrong forced the plaintiff into the strait of proving damages, cannot complain that the latter wishes to use the best methods left him for accomplishing the result.[19]

The court, in *Turpin* v. *Jones*, suggested that the plaintiff wait until after the season's crop was grown, and then renew his action. And on its face the suggestion seems eminently sensible. Far better evidence would then be available, both as to the value of the crop and as to the plaintiff's earnings in other employments. By the original contract, he did not contemplate any compensation until that time. Furthermore, while the measure of damage is usually considered a matter of substantive law,[20] the admission of evidence and the computation of the amount of damage are purely matters of procedure.[21] Courts frequently, in their discretion, suspend a trial or an inquiry for the assessment of damages for a reasonable time, until evidence not then on hand becomes available.[22] But one must proceed carefully. If this is entirely a matter of evidence, it must be recognized as such, and may be dealt with through the proper medium of a continuance or a postponed assessment of damages. It may do very well to postpone the trial in this way, but the plaintiff should not be required to bring an entirely new suit.[23] To deny a remedy for established rights, as did the Kentucky court, is to exercise a jurisdiction closely analogous to that usurped by the English Chancellor in the course of the seventeenth century, at a time when there was a real need for a softening liberality in applying the rules of the strict law. With the growth of equity and modern legal procedure, that time has passed. We are here in a court of law, where certain legal results are supposed to follow upon the establishment of a certain set of facts. To extend the discretion of the judge from evidence into substance would be a far-reaching and inherently dangerous change.

EFFECT OF AN ORAL DIRECTION TO A DEBTOR TO PAY THE DEBT TO A DONEE AT THE CREDITOR'S DEATH. — It is probably a common transaction, particularly where the parties are all members of the same family, for a creditor orally and gratuitously to direct his debtor to pay the money to a third person at the creditor's death. The legal effect of such a direction, given without any thought of possible litigation and in reliance on the honor of the parties, and yet intended to create a binding

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The court refused to allow conjectural profits as the measure of damages, but took the more certain measure of the difference between the contract price and the normal rental value, in money. The court in the later case was evidently misled by a failure to notice the great difference in the circumstances of the two cases.

[19] See Shoemaker *v.* Acker, *supra*.

[20] See SEDGWICK, DAMAGES, 9 ed., § 1373.

[21] See *id.*, § 1383. The line between the two is not clear, and it is often hard to determine with which the courts are dealing. Thus, for the destruction of growing crops, some courts take the measure of damage to be the value of the crops when destroyed, to be estimated by taking the market value at maturity less the cost of producing; while others take the latter statement to be the actual measure of damage. *Cf.* also Cornelius *v.* Little, *supra*, with Harrell *v.* Johnson, *supra*.

[22] See WIGMORE, EVIDENCE, § 2575.

[23] There may be some question whether the decision in Turpin *v.* Jones does not make the matter *res judicata*. This certainly should not be the result.